No. 13,015

IN THE

United States Court of Appeals

For the Ninth Circuit

TITLE INSURANCE AND GUARANTY COMPANY (a corporation); EDITH A. WILDE, Administratrix of the Estate of Jerome J. Wilde, Deceased, and MERVYN GOODMAN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court, Northern District of California, Southern Division.

APPELLANTS' OPENING BRIEF.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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JURISDICTION.

This action (in condemnation) was instituted in the District Court of the United States, for the Northern District of California, Southern Division, pursuant to the provisions of the Act of Congress approved January 29, 1942 (Public Law 420, 77th Congress, 56 Stat., Chapter 25), and the Act of Congress approved

February 7, 1942 (Public Law 441, 77th Congress, 56 Stat. Chapter 46), appropriating funds therefor.

The judgment from which this appeal is taken was entered on February 12, 1951 (Tr. p. 16), upon the verdict of a jury returned on December 13, 1950 (Tr. p. 4). A motion to amend and alter said judgment was made and filed on February 19, 1951 (Tr. p. 19). Such motion was denied on March 2, 1951 (Tr. p. 20). Notice of appeal from said judgment was filed April 28, 1951 (Tr. pp. 20, 21). Orders extending the time to docket the record on appeal to the 20th day of July, 1951, were duly made (Tr. pp. 23, 24, 25). The record on appeal was filed herein on July 17, 1951 (Tr. p. 49).

The jurisdiction of this court to entertain this appeal lies in United States Code Title 28, Section 1291.

STATEMENT OF THE CASE.

This action was brought by the United States of America to condemn various parcels of land situated in the City and County of San Francisco, State of California, four of which are involved in the judgment from which this appeal is taken (Tr. pp. 10, 11, 12).

The complaint was filed July 25, 1942 and plaintiff went into possession of the said four parcels of land on said day and remained in the exclusive possession and control thereof up to and including the time of trial (Tr. p. 7). The cause was tried before

a jury which returned its verdict fixing the fair market value of the property in question as well as fixing the fair market value of its use and occupancy by the plaintiff (Tr. pp. 3, 4).

SPECIFICATION OF ERROR.

The judgment entered by the trial court does not conform to or with the verdict of the jury (Tr. p. 25).

The jury returned its verdict (in so far as it related to the value of the use of the property), as follows:

> "We, the jury find that the fair market value of the *annual* (italics ours) use of Parcel No. 16 is the sum of $20.00."
>
> "We, the jury find that the fair market value of the *annual* (italics ours) use of Parcel No. 45 is the sum of $125.00."
>
> "We, the jury find that the fair market value of the *annual* (italics ours) use of Parcel No. 46, is the sum of $232.50."
>
> "We, the jury find that the fair market value of the *annual* (italics ours) use of Parcel No. 50 is the sum of $980.00."

The trial court fixed the damages sustained by defendants resulting from the use and occupancy of the property by the plaintiff from the time that plaintiff took possession thereof to-wit: July 25, 1942 (Tr. p. 7) until the time that the jury returned its verdict to-wit: December 13, 1950 (Tr. p. 4) in the same

amount fixed by the jury for the *annual* use and occupancy of the property (Tr. p. 6).

It is fairly obvious that the judgment in question does not conform to or with the verdict which in fact the jury returned. It is plain and unambiguous and speaks for itself.

ARGUMENT.

We will not dwell at any great length upon the Constitutional guaranty of the right to trial by jury. In the hearts and minds of many it is one of the most cherished of all Constitutional rights. Once a verdict has been returned, the court is conclusively bound by it, unless it has express statutory authority to change or modify it.

Nor will we burden this court with the citation of the numerous cases, under varying conditions, in which the right has been jealously upheld. Two of them will suffice to explain our position.

The case of *Mutual Benefit Health and Accident Assn. v. Thomas,* 123 Fed. (2d) 352 (Eighth Circuit) was an action upon a policy of insurance which provided indemnity for accident and sickness disability. Upon trial, a jury returned a nominal verdict in favor of plaintiff. Later upon motion of plaintiff, a judgment was entered by the court substantially in excess of the amount fixed by the jury. In commenting upon the propriety of the trial court's action, the Court of Appeals said at page 356:

> "We think the Seventh Amendment denied to the court the power to increase the amount of the verdict in the instant case. This is not a case where the court denied a motion for a new trial on condition that plaintiff remit a portion of an excessive verdict, but a clear case of a change of the verdict of the jury. Except for such unusual cases, and the case of reservation of decision on motion for a directed verdict as provided by Rule 50 of the Rules of Civil Procedure, or the granting of a new trial, the verdict of the jury must be accepted as conclusive."

It should be borne in mind that plaintiff made no motion of any character before the trial court and in the light of the foregoing rule, that court was without any jurisdiction to change or modify the verdict and was bound to enter a judgment in accordance therewith.

If the appellee seeks to make objections to the form of the verdict, or that it was not in accordance with the instructions of the court, appropriate objections should have been taken in the court below as indicated by the case of *Reidy v. Myntti,* 116 Fed. (2d) 725 (Ninth Circuit). That case involved the payment of disputed mining royalties. There the trial court instructed the jury (p. 731) as follows:

> "If, * * * you find that the ground mined by the defendants during the year 1937 was a part of said leased premises, you should ascertain, by a preponderance of the evidence, the value of the gold dust, and so forth, mined and recovered from said leased premises by the defendants during the

year 1937, and you should find in favor of the plaintiff for 12½% of said value, *together with interest thereon at the rate of six per cent per annum from the close of the mining season of 1937.*" (Emphasis supplied.)

A verdict was returned by the jury (p. 726) as follows:

"We, the Jury * * * do, from the law and evidence therein, find in favor of the plaintiff and against the defendant on the issues joined herein and that there is owing to the plaintiff from the defendants the sum of $9,375.00, plus $300.00 withheld, for royalty from mining operations during the years of 1936 and 1937, together with interest thereon."

The judgment entered by the trial court included interest only from the date of the judgment. In affirming the judgment the court held at page 731:

"The question of the sufficiency of the jury's verdict was not raised by the plaintiff until the trial court had discharged the jury. Counsel did not request that the jury make the verdict more definite. The judgment of the Court is in conformity with the verdict as rendered. If counsel for the plaintiff wishes to question the verdict, as conforming to the Court's instructions, he should have raised that question at the time of its rendition.

Plaintiff has cited us no cases, and our research fails to disclose any, authorizing the trial court or the appellate court to correct or add to a verdict after the jury is discharged."

It is respectfully submitted that the judgment should be reversed and the trial court be directed to enter a judgment in accordance with the verdict.

Dated, San Francisco, California,
September 14, 1951.

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